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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCA MONTES, Defendant and Appellant.	B216923 (Los Angeles County Super. Ct. No. NA081455)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed as modified.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Francisca Montes of misdemeanor criminal threats. She makes these contentions on appeal: (1) the prosecutor referred to her post-arrest silence, in violation of her Fifth and Fourteenth Amendment rights; (2) the prosecutor committed prejudicial misconduct; (3) the trial court should have sua sponte instructed the jury on attempted criminal threats; (4) a witness offered improper lay testimony; (5) evidence, including gang evidence, was improperly admitted; and (6) there were errors in the sentence. We agree that there were errors in defendant's sentence, and we therefore modify it accordingly, but we otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *Prosecution case.*

In 2009, Maribel Duenas bought an apartment complex. Defendant lived in Unit 3. Duenas was inside defendant's apartment building two to three weeks before the underlying incident and noticed gang graffiti on the walls in the bedrooms. "Smiley," "Giggles," "Baby Doll," "Little Spanky from the East Side," and "East Side Wilmington Hyatt Street Locals" were written on the walls. Duenas, who lived in the neighborhood, recognized these as gang names. Some of the names were crossed out, which to Duenas meant they were going to be killed. One name, Liz, was crossed off and a "187" pointed at the name. The Hyatt Street Locals was the gang on the particular street where Duenas lived, and East Side Wilmas was the main gang in Wilmington. Frightened by what she saw, Duenas did not confront defendant about the graffiti.

But in February 2009, she served defendant with an eviction notice, because defendant was destroying property; she had thrown beer bottles at other tenants; she wasn't paying rent; and Duenas had received complaints about her.

On March 16, 2009, Duenas, with her husband (Lamberto Garcia) and eight-year-old daughter, went to defendant's apartment. Defendant had called the day before to report that something was broken. Defendant's son, Francisco Medina, was home, and he said something about a door. Duenas was on her way out when defendant arrived.

Defendant told her about a screen that had been lost or misplaced, and Duenas said that defendant would have to replace it.

Upset, defendant said she was going upstairs to get her daughter. Believing that defendant's daughter wasn't supposed to be living at the apartment, Duenas followed defendant to the apartment, where she saw the daughter washing children's clothes. Duenas told defendant that her daughter wasn't on the lease and wasn't supposed to be washing clothes, because Duenas paid for the utilities.

Defendant reacted violently. In Spanish, she said to Duenas, who was also fluent in Spanish: " 'You fucking bitch. You are a dog.'. . . '[N]ext time I see you, I swear to God, I am going to kill you.' " Defendant screamed and cussed at her, saying, " 'I want to kill you, you fucking bitch. Next time you come over, I am going to kill you.' " Garcia, Duenas's husband, overheard the threats. In fear for her and her family's safety, Duenas told her husband to take their daughter, who was crying, away. Defendant started coming down the stairs after Duenas, repeating that she would kill Duenas, who called 911. Defendant said, " 'You fucking bitch. Why are you calling the police? I am going to call [*sic*] you. I swear to God, if you make the phone call, I am going to kill you.' " The police told Duenas to lock herself in her car and to wait for them. Defendant followed Duenas outside, continuing to cuss at her and telling her to "call the police, you fucking bitch." Defendant's 17-year-old daughter was also outside, and she was on the phone. Cars started pulling up, and "girls" and "guys" surrounded Duenas.

Jose Iniguez and his son, Jonathan Rodriguez, went outside. They lived next door to the apartment complex owned by Duenas. Iniguez was in his kitchen when he heard yelling between Duenas and defendant about laundry. He heard defendant say in Spanish to Duenas, " 'You are going to pay for all this. You are not paying for me for all this.' " A native Spanish speaker, Iniguez, said that Spanish speaking people would understand this to be a threat: " 'you are going to pay for all this' " meant "I am going to hurt you" or "I am going to kill you." Rodriguez also heard defendant yell, " 'You are going to pay for this,' " at Duenas. Thinking that Duenas was in danger, Iniguez called 311. He went

outside to ask Duenas to come inside. Defendant yelled at him to "take care of [his] own fucking business" and she called him an "old mother fucker man" and "faggot."

Defendant's daughter was also outside. She told Rodriguez that she would get her boyfriend to kill him and his father. It took the police over an hour to arrive.

B. *Defense case*.

Francisco Medina overheard the argument between his mother and Duenas. Although Duenas and defendant argued, he did not hear his mother threaten Duenas.

Defendant testified that when she first saw Duenas on March 16, 2009, she explained why she had called her. Duenas became upset because defendant's daughter was living at the apartment. They both became upset and argued about who paid which utility bill. Defendant, however, did not threaten Duenas. Rather, it was Duenas who said she didn't " 'give a shit' " and she would call the police " 'on you, you fucking old lady.' " Defendant went downstairs about 20 minutes later, and Duenas told her the police were coming. Defendant did not talk to Iniguez or to Rodriguez. Photographs had covered the graffiti on the walls and she hadn't seen the writing before the photographs were removed. Her daughters would not tell her what "Wilmas" meant.

II. Procedural background.

Defendant was charged with felony criminal threats (Pen. Code, § 422),[1] but the trial court reduced it to a misdemeanor under section 17, subdivision (b). On May 20, 2009, a jury found defendant guilty of criminal threats. The trial court sentenced her the same day to three years' probation on the condition she serve 45 days in jail.

DISCUSSION

I. Comments on defendant's post-arrest silence did not constitute prejudicial *Doyle* error.

Defendant contends that the prosecutor commented on her post-arrest silence and that these comments gave rise to federal constitutional error under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*). We disagree that prejudicial error occurred.

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[1] All further undesignated statutory references are to the Penal Code.

In *Doyle*, the defendant was charged with selling narcotics. At the time he was arrested, the defendant gave no statement, but at trial he testified he had been framed. The prosecutor, on cross-examination, asked the defendant if he told the officer who arrived at the scene what had happened, which he hadn't. The court rejected the State's argument that the defendant's post-arrest silence was important because it contradicted the exculpatory story the defendant told at trial. (*Doyle, supra*, 426 U.S. at p. 618.) Using for impeachment purposes the defendant's silence at the time of arrest and after receiving *Miranda* warnings violated the Due Process Clause of the Fourteenth Amendment: "[W]hile it is true that the *Miranda* warnings contain no express assurance that [the] silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Doyle*, at p. 618.)

Greer v. Miller (1987) 483 U.S. 756, explained that two elements comprise a *Doyle* violation: first, the prosecution used a defendant's post-arrest silence for impeachment purposes, either during questioning or by reference during closing argument; second, the trial court permitted that use. (*Greer*, at pp. 761-764.) "The type of permission specified in *Greer* will usually take the form of overruling a defense objection, thus conveying to the jury the unmistakable impression that what the prosecution is doing is legitimate." (*People v. Evans* (1994) 25 Cal.App.4th 358, 368.) *Doyle* is violated when even a single question is posed and a defense objection is overruled. (*Evans*, at p. 362.) But where the prosecutor's inquiry and argument constituted a fair response to defendant's testimony, there was no *Doyle* error. (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1452.)

Defendant bases her claim of *Doyle* error on the following examinations and argument:

1. Cross-examination of defense witness Francisco Medina.

Defendant's son, Francisco Medina, testified for the defense. The prosecutor cross-examined him:

"Q. So you were outside with your mom, correct?

"A. Yes.

"Q. And the police did arrive?

"A. Yes. But they came really late.

"Q. You didn't speak with the police about what you had seen, correct?

"A. They wouldn't let us, they wouldn't let us speak.

"Q. You tried to?

"A. Yes. But they wouldn't.

"Q. How did you try to?

"A. Well, I was just outside but the police were just with the landlady."

There are several problems with the argument that *Doyle* error occurred here. First, the defense did not object, and *Doyle* requires an objection. (*Greer v. Miller, supra,* 483 U.S. at pp. 761-764.) Second, Medina was asked what *he* said to the police when they arrived, and not specifically what his mother said. *Doyle* does not protect the silence of a nondefendant. Third, Medina was not given his *Miranda* rights, and *Doyle* concerns comments on post-arrest silence after such rights are given.

Defendant, however, relies on *People v. Lindsey* (1988) 205 Cal.App.3d 112 (*Lindsey*), to argue this is all irrelevant, because the prosecutor "used [defendant's] silence 'through' her son" rather than through counsel as in *Lindsey*. The defendant in *Lindsey* was charged with robbery and burglary. At trial, the defendant's mother offered an alibi for her son: he was at home, sick, on the day the crimes occurred. During closing argument, the prosecutor condemned defense counsel for failing to inform the prosecution of the alibi defense—if her client was innocent, why didn't she come forward sooner with the alibi? The trial court overruled a defense objection.

Citing *People v. Galloway* (1979) 100 Cal.App.3d 551, where the defendant testified and gave an alibi, the *Lindsey* prosecutor cross-examined defendant about his failure to raise the alibi sooner and the court held that this was *Doyle* error: "The only significant difference between the present case and *Galloway* is that here the prosecutor commented on defense counsel's failure to mention the alibi defense to the prosecutor or the police, rather than the defendant's failure to do so. But given the general understanding, widespread even among nonlawyers, that an attorney speaks for his or her client, the distinction is inconsequential. The prosecutor's condemnation of counsel for failing to reveal the alibi defense was tantamount to condemnation of the defendant himself for failing to do so." (*People v. Lindsey, supra,* 205 Cal.App.3d at pp. 116-117, italics omitted.)

Cross-examining Medina about his silence was not comparable to the situations in either *Galloway* or *Lindsey*. No privity exists between a mother and son as between an attorney and client. And, as we have said, there is a great difference between asking a *witness* why he didn't tell the police what happened and asking the same of a *defendant* who has asserted her *Miranda* rights. *Miranda* protects the rights of the accused, not of witnesses.

2. The prosecutor's cross-examination of defendant.

Defendant testified in her defense. This occurred during the prosecutor's cross-examination of her:

"Q. [The prosecutor]: At some point that night you were arrested?

"A. Yes.

"Q. That was by LAPD officers; is that correct?

"A. I think so. They are from Wilmington.

"Q. Did you try to explain to the officers what had happened to you?

"[Defense counsel]: Your Honor, I don't think this is proper. I am going to object.

"The court: Overruled.

"The witness: No. Because I wasn't given a chance to until I got to the police station. And I asked the officer because he is not one who could speak Spanish.

"[Defense counsel]: Objection.

"The court: Sustained.

"[The prosecutor]: At the station there was a Spanish speaking officer; is that right?

"A. Yes. A girl.

"Q. Did you agree to speak with that person?" Defense counsel asked for a sidebar, where he said defendant exercised her *Miranda* rights. The trial court asked if defendant said anything at the police station, and the prosecutor said she hadn't, but he wanted to find out what defendant had to say. The court told him he could not "use that."

During closing argument, however, the prosecutor again commented on defendant's silence, as well as on her son's: "When the police arrived, did she [(defendant)] plead her case to the police when they first arrived? No. She testified they didn't speak Spanish. They wouldn't listen to her. The LAPD didn't have any Spanish speaking officers in the City of Wilmington on that day. [¶] Francisco Medina. He says he had witnessed all this. He says he was in his bedroom with the door open and he could see Maribel Duenas threatening his mom. Did he act consistently with what a son who has seen their mom being threatened would have done? [¶] What did he say he did? When he saw this happening, he said that he walked out to the living room and he stood by. He said he didn't get involved. He didn't say anything. He didn't do anything. He just watched. He watched all these threats being made. He heard them. He claimed exactly the same thing that defendant Montes said that Maribel Duenas was in her face[,] yelling at her, cussing her out. But he just stood there. He didn't get himself involved. Exactly like defendant Montes said that Mr. Garcia, the husband, had to drag Maribel Duenas out. [¶] After supposedly that happened, did he call the police? No. . . . [¶] . . . What did he say when the police arrived? Exactly the same thing . . . defendant Montes said. I tried to tell them but nobody spoke Spanish. There is no evidence that Francisco Medina went to the police station and said give me a Spanish speaking officer. I want to

let the officers know they arrested the wrong person. They should have arrested Maribel Duenas. There is no evidence that that happened. [¶] There is no evidence that between March 16 and yesterday's date when he testified in court that he did anything to try to fix this situation. . . . He claims that his mom was a victim of threats. No evidence that he sought any kind of protection for his mom, Maribel Duenas. No evidence that he contacted the D.A.'s office, said you are prosecuting the wrong person. All he did was come to court and he gave you a version that is wholly inconsistent with what somebody in his situation would have or should have done."[2]

The cross-examination constituted *Doyle* error. The prosecutor asked defendant why she didn't tell the police what happened. Defense counsel's objection was overruled, and defendant therefore had to explain her silence. After defendant answered, defense counsel objected again, and this time the objection was sustained. But the prosecutor pressed on, asking defendant whether there was a Spanish speaking officer at the station. At the sidebar requested by defense counsel, the prosecutor admitted that defendant continued her silence at the police station, but he nonetheless wanted to find out what she had to say. The Attorney General suggests that the prosecutor was asking about *pre-arrest* silence. (See generally, *Jenkins v. Anderson* (1980) 447 U.S. 231, 239-240 [prosecutor could cross-examine the defendant about why he didn't call the police to explain what had happened in the days preceding his arrest].) That suggestion is belied by the prosecutor beginning this line of questioning by first asking if at some point that night defendant was arrested and next asking about her silence. The prosecutor then commented again on defendant's silence during closing argument, although no objection was asserted at that time.

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[2] To the extent that defendant argues that the prosecutor violated *Doyle* by asking Medina about his silence, we have rejected that argument above. We also point out that the defense did not object, a requirement under *Doyle*.

Under these circumstances, the two prerequisites of *Doyle* error were satisfied. First, the prosecutor asked defendant during cross-examination why she didn't explain what had really happened (according to her) to the police. That the prosecutor was asking about her post-arrest silence was confirmed by the prosecutor's follow-up question regarding whether there was a Spanish speaking officer at the station and by the discussion at side-bar, where the prosecutor admitted he was asking her about her silence *after* defendant had asserted her *Miranda* rights. Second, defense counsel objected, and the objection was overruled. That a second objection—asserted after defendant had to answer—was sustained does not persuade us that the *Doyle* error was mitigated.

We therefore must consider whether the error was prejudicial. *Doyle* error is reviewed under the standard in *Chapman v. California* (1967) 386 U.S. 18, that is, whether the error was harmless beyond a reasonable doubt. (*People v. Evans*, *supra*, 25 Cal.App.4th at p. 372.) It was harmless. Duenas's version of events was corroborated by three other people: Duenas's husband; a neighbor, Iniguez; and Iniguez's son, Rodriguez. Moreover, the two references to defendant's silence (once during cross-examination of defendant and once during the prosecutor's closing argument) were "fleeting." (*People v. Hinton* (2006) 37 Cal.4th 839, 868 ["two fleeting references" could not have affected the jury's verdict].) We therefore conclude that any *Doyle* error was harmless.

II. Prosecutorial misconduct.

Next, defendant contends that the prosecutor engaged in misconduct twice, once while cross-examining defendant and once during closing argument.[3]

[3] Defendant also cites the prosecutor's references to defendant's post-arrest silence as additional instances of prosecutorial misconduct. Because we have found either no *Doyle* error or harmless error, the claims of prosecutorial misconduct based on those instances fail.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*Ibid.*; see also *People v. Thompson* (2010) 49 Cal.4th 79, 126.)

A. *The prosecutor's cross-examination of defendant.*

The first instance of alleged prosecutorial misconduct occurred during cross-examination of defendant, who testified that she did not threaten to kill Duenas.

"Q. [The prosecutor]: Miss Montes, as you are testifying today, you claim you never made a threat to your landlady on March 16, 2009?

"A. I never threatened her.

"Q. You heard the testimony of Miss Duenas, her husband, Mr. Garcia, Mr. Iniguez and Jonathan Rodriguez, correct?

"A. Yes.

"Q. It is your claim that everything they testified to is a lie?

"A. It is a lie."

People v. Zambrano (2004) 124 Cal.App.4th 228, 236 (*Zambrano*), first addressed " 'were they lying' " questions.[4] Zambrano was arrested for selling cocaine to two undercover officers. The officers testified at trial about the transaction, which Zambrano denied took place. He instead testified that an officer arrested him. On cross-

[4] *People v. Foster* (2003) 111 Cal.App.4th 379, 385, concerned similar questions but did not decide whether asking them constituted prosecutorial misconduct.

examination, the prosecutor repeatedly asked defendant if the officers were lying and whether " 'everybody is lying except for you?' " (*Id.* at p. 235.) *Zambrano* noted that there were three lines of thought on the propriety of such questions: the first line held that asking " 'were they lying' " questions was always misconduct; the second held that asking them was not misconduct; and the third line held that asking them was not categorically improper or proper, but were proper under certain limited circumstances. (*Id.* at pp. 238-239.) Although *Zambrano* found that the prosecutor committed misconduct in its case, the court agreed with the third line of cases, noting that " 'were they lying' " questions may be appropriate, for example, when necessary to clarify a particular line of testimony.

Our California Supreme Court agreed with *Zambrano*'s approach in *People v. Chatman* (2006) 38 Cal.4th 344. The court referenced circumstances under which " 'were they lying' " questions would be appropriate; for example, where the witness might have information about whether other witnesses had a bias, interest or motive to lie. "At least when, as here, the defendant knows the witnesses well, we think questions regarding any basis for bias on the part of a key witness are clearly proper." (*Id*. at p. 383.) There is a difference between asking a witness whether in his or her opinion someone else is lying and asking that witness whether he or she knows of a reason why someone else would lie. (*Id.* at p. 381.) *Chatman* thus cautioned courts to scrutinize carefully " 'were they lying' " questions in context. "They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*Id.* at p. 384.)

Here, defendant did not object to the prosecutor's question or seek a curative admonition, and therefore she has forfeited the claim on appeal. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 97.) In any event, any misconduct was not prejudicial.

The " 'were they lying' " questions asked by the prosecutor in this case were like the improper ones asked in *Zambrano*. As *Zambrano* found, the questions were irrelevant to any issue in the case, did not clarify defendant's prior testimony, and did not figure into any facts or circumstances surrounding defendant's testimony, or develop independent evidence that ran contrary to his testimony. (*Zambrano, supra,* 124 Cal.App.4th at p. 240.) "The questions served no purpose other than to elicit defendant's inadmissible lay opinion concerning the officers' veracity. The questions merely forced defendant to opine, without foundation, that the officers were liars." (*Id.* at p. 241.)

The Attorney General, however, argues that because defendant knew the witnesses who testified against her (Duenas was her landlady and Iniguez and Rodriguez were her neighbors), she might have had personal knowledge about why they might lie; for example, Duenas wanted to evict her from the property and Iniguez and Rodriguez didn't want her as a neighbor. Had the prosecutor asked defendant if she knew of any motive for the witnesses to lie, then that might not have been improper under *Zambrano* and *Chatman*. But that is not what the prosecutor asked. He asked, first, if it was defendant's claim that she never threatened Duenas. Then he asked if he heard the testimony of the witnesses against her. Finally, he asked if it was her "claim that everything they testified to is a lie?" The prosecutor ended his questioning at that; he did not ask defendant if she knew *why* they might lie.

In any event, it is not reasonably probable that the jury would have reached a more favorable result in the absence of any error. (*Zambrano, supra,* 124 Cal.App.4th at p. 243.) Four witnesses (Duenas, Garcia, Iniguez, and Rodriguez) gave similar accounts of the events. The question was asked once. We therefore conclude that any error was harmless.

B. *The prosecutor's closing argument.*

The second instance of alleged prosecutorial misconduct occurred during the prosecutor's closing argument when he, allegedly, mischaracterized the prosecution's burden of proving defendant's guilt beyond a reasonable doubt. He said: "The burden on the prosecution . . . was beyond a reasonable doubt, not beyond all possible doubt[,] . . .

I ask you when you are deliberating, when you are deciding this case, that the prosecution's case be held to that burden. Nothing more, nothing less. [¶] Now in deciding which version to believe, how do you do that? You assess credibility. Same thing we talked about at the beginning of this trial. And how do you assess credibility in this situation? As we were going through the trial, as I was calling witnesses, as I was going over my notes, I think the best way to do that, having reviewed everything myself, is to ask yourself this question: who acted consistently with how a victim is threatened would act, and who acted inconsistently with how a victim who is threatened would act. [¶] *Remember, the version we were presented by the defense was this, Maribel Duenas is not a victim of criminal threats from defendant Montes. The version you were presented and you would necessarily have to believe if you acquit defendant Montes and you found her not guilty is that what she told you was the truth*; that she was the victim of threats coming from Maribel Duenas, not Maribel Duenas. That Maribel Duenas was the one threatening her." (Italics added.) Later, the prosecutor added, "*Remember, all you have to decide is which version do you believe, which one is the truth. Who* [*is*] *lying*?" (Italics added.)

Defendant analogizes the italicized statements to ones made in cases where the prosecutors misstated the burden of proof. In *People v. Hill* (1998) 17 Cal.4th 800, the prosecutor said the reasonable doubt " 'must be reasonable. It's not all possible doubt. Actually, very simply, it means, you know, you have to have a reason for this doubt. There has to be some evidence on which to base a doubt.'. . . 'There must be some evidence from which there is a reason for a doubt. You can't say, well, one of the attorneys said so.' " (Italics omitted.) *Hill* found the statements to be ambiguous and to present an "arguably close" question, but nonetheless found misconduct. (*Id.* at p. 831.) Whether that single instance of misconduct would have warranted reversal was not addressed; reversal was based on the cumulative effect of misconduct and other errors.

In *People v. Johnson* (2004) 119 Cal.App.4th 976, it was the trial judge who first misstated the reasonable doubt standard during voir dire, telling the jurors, among other things, it was acceptable to find the defendant guilty even if they had "some doubt" and gave examples of every day decisions about which people have doubts. (See also *People v. Johnson* (2004) 115 Cal.App.4th 1169 [reversible error for the trial judge to indicate that people make every day decision despite reasonable doubt].) The prosecutor then took his cue from the trial judge during closing argument and referred to "possible" doubt and "some" doubt. *Johnson* reversed the judgment on due process grounds.

We do not think that what the prosecutor said here was clear error as in the *Johnson* cases. Viewing the statement in context, the prosecutor first said, correctly, that the burden of proof was on the prosecution, and that it "was beyond a reasonable doubt, not beyond all possible doubt." He asked to be held to that burden. The prosecutor moved on to the two versions of what happened: Duenas's version in which defendant threatened her and defendant's version in which she did not threaten Duenas. He told the jury that to decide which version to believe, it needed to assess the witnesses' credibility. He then made the challenged statements in that context, that is, how to evaluate the witness's credibility, arguing that Duenas acted consistently with someone who had been threatened. The prosecutor continued to contrast how Duenas acted when threatened (i.e., she left the apartment, got her daughter away, and called the police) with how defendant acted when Duenas allegedly threatened her (she did not call the police).

The statement ("you would necessarily have to believe if you acquit defendant Montes and you found her not guilty is that what she told you was the truth") by itself, was arguably incorrect, and might be understood to place a burden on defendant. But defendant did not object to any of the now challenged closing argument statements; and therefore, she failed to preserve the issue for appeal. " 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Hill, supra,*17 Cal.4th at p. 820.) In any event, when we place the statements in context, and given that

the jury was instructed on reasonable doubt, we find it unlikely that the jury interpreted the statements in the way defendant urges or that it was reasonably probable that the jury would have reached a result more favorable to the defendant had any misconduct not occurred. (*Zambrano, supra,* 124 Cal.App.4th 228.)

C. *Ineffective assistance of counsel.*

Defendant's trial counsel did not object to any of the above alleged instances of prosecutorial misconduct; and therefore, she alternatively contends that her trial counsel provided ineffective assistance. (See generally, *People v. Hill, supra,*17 Cal.4th at p. 819; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Because we have concluded that any error was harmless, defendant's ineffective assistance of counsel claims also fails, as she cannot establish prejudice. (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.)

III. Failure to instruct on lesser included offense of attempted criminal threats.

The trial court did not instruct on attempted criminal threats, which defendant contends was error. It was not error.

A trial court has a sua sponte duty to instruct on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 162.) " 'Substantial evidence' " is " ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed." (*People v. Flannel* (1979) 25 Cal.3d 668, 684, overruled on other grounds in *In re Christian S.* (1994) 7 Cal.4th 768, 777.) It is evidence "sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) But any evidence, no matter how weak, will not give rise to a sua sponte duty to instruct on a lesser included offense. (*Flannel*, at p. 684, fn. 12.) "[S]peculation is not evidence, less still substantial evidence." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081, overruled on another ground in *People v. Hill, supra,* 17 Cal.4th 800.) Thus, the trial court properly refuses to instruct on a lesser included offense when there is insufficient evidence to support the instruction. (*People v. Daniels* (1991) 52 Cal.3d 815, 868.)

A defendant is guilty of making a criminal threat when there is substantial evidence that (1) the defendant willfully threatened to commit a crime that could result in another's death or great bodily injury; (2) defendant specifically intended the statement be taken as a threat (notwithstanding that the defendant might not have intended to carry out the threat); (3) the threat, on its face and under the circumstances made, is so unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution; (4) the threat caused the victim to suffer sustained fear for his or her safety; and (5) the fear was reasonable under the circumstances. (§ 422; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) An attempted criminal threat is a lesser included offense of making a criminal offense. (*Toledo,* at pp. 230-231.) It occurs when, for example, a written threat is intercepted before it reaches the intended victim, or a defendant makes a sufficient threat directly to the victim but the victim does not understand the threat or understands the threat but for some reason is not placed in sustained fear, notwithstanding that a person in the victim's place might reasonably have been in sustained fear. (*Id.* at p. 231.)

Citing *In re Ricky T.* (2001) 87 Cal.App.4th 1132, defendant argues that there was a failure of proof on whether her statements were so unequivocal and immediate as to convey an imminent prospect of execution. In *Ricky T.*, a classroom door hit the minor's head; he told his teacher, " 'I'm going to get you.' " (*Id.* at p. 1135.) This threat "lack[ed] credibility as indications of serious, deliberate statements of purpose," and it was "ambiguous on its face and no more than a vague threat of retaliation without prospect of execution." (*Id.* at pp. 1137-1138.) The ambiguous statement in *Ricky T.* contrasts with defendant's statements to Duenas: " 'I swear to God, I am going to kill you.' " " 'I want to kill you, you fucking bitch. Next time you come over, I am going to kill you.' " " 'You fucking bitch. Why are you calling the police? I am going to call [*sic*] you. I swear to God, if you make the phone call, I am going to kill you.' " Defendant's repeated threats were unambiguous and clear and immediate, having "that degree of seriousness and imminence which is understood by the victim to be attached to

the future prospect of the threat being carried out . . . ." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538, italics omitted.)

Next, defendant cites *In re Sylvester C.* (2006) 137 Cal.App.4th 601, to support her argument that there was insufficient proof Duenas was in sustained fear for her life. In *Sylvester*, the minor threatened to kill several people, including Mejia, who did not testify at trial. Another witness, however, testified that " 'everybody got scared.' " (*Id.* at p. 606.) The court found that there was insufficient evidence to establish whether Mejia was in sustained fear, and therefore the minor could not be convicted of criminal threats. He could, however, be convicted of attempted criminal threats. (*Id.* at pp. 607-611.)

Unlike in *Sylvester C.*, the victim, Duenas, in this case testified that she was afraid. Her fear was evidenced by her telling her husband to take their daughter away from the apartment building. Defendant interprets this evidence differently: if Duenas was so afraid, why didn't she also leave with her husband and child? The jury was entitled to interpret this evidence either way; but it wasn't the only evidence that Duenas was afraid. She also called 911. And when she went outside, people surrounded her. When Iniguez tried to help her, defendant's daughter threatened him.

Given Duenas's repeated statements that she was afraid and the evidence showing that her fear was reasonable, if defendant was guilty, she was guilty of criminal threats. The trial court therefore did not have a sua sponte duty to instruct on the lesser offense of attempted criminal threats.

IV. CALCRIM Nos. 358 and 359.

The trial court instructed the jury with CALCRIM Nos. 358[5] and 359.[6] When the court asked if there were any objections to No. 358 as "[t]here was an introduction of statements defendant allegedly made," the prosecutor pointed out that they were "part of the offense." Defense counsel didn't think that No. 359 was an issue in the case and would confuse the jury. The court, however, said that it had to give No. 359 if it gave No. 358. The court thereafter instructed the jury with Nos. 358 and 359.

Defendant's argument is that the instructions were inapplicable where, as here, the statements constituted the crime. In *People v. Zichko* (2004) 118 Cal.App.4th 1055 (*Zichko*), the defendant was charged with criminal threats. The trial court did not instruct the jury with CALJIC No. 2.71,[7] which is similar to CALCRIM Nos. 358 and 359, except

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[5] "You have heard evidence that [the] defendant made an oral or written statement before the trial. You must decide whether or not the defendant made any of these statements[,] in whole or in part. [¶] If you decide that the defendant made such statements, consider the statements[,] along with all of the other evidence[,] in reaching your verdict. It is up to you to decide how much importance to give to such statements. [¶] You must consider with caution evidence of defendant's oral statements unless it was written or otherwise recorded."

[6] "The defendant may not be convicted of any crime based [on] her out of court statements alone. You may only rely on the defendant's out of court statements to convict her if you conclude that other evidence shows that the charged crime was committed. [¶] [That] [t]he other evidence may be slight and [need] only [be] enough to support a reasonable inference that a crime was committed. The identity of the person who committed [the] crime may be proved by the defendant's statements alone. You may not convict the defendant unless the People have proved her guilt[y] beyond a reasonable doubt."

[7] "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an [oral admission of [a] [the] defendant not contained in an audio or video recording and not made in court should be viewed with caution.]"

No. 2.71 applies to admissions and Nos. 358 and 359 refer to statements.[8] *Zichko* held that the trial court did not err by failing to give the instruction, because the "statements constituted the crime, not admissions of the crime within the meaning of CALJIC No. 2.71." (*Id.* at p. 1059.) Thus, Zichko's threat to the bank teller did not acknowledge the crime, it was the crime. (*Id.* at p. 1060.)

Unlike in *Zichko*, there were other statements made by defendant here that did not constitute the crime and to which the instructions applied; for example, defendant's statements to Iniguez to "take care of [his] own fucking business" and calling him an "old mother fucker man" and "faggot." But defendant took no action to limit the instruction to particular statements. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 122 [defendant may not complain on appeal trial court erred in failing to clarify a legally correct jury instruction unless he requested such clarification in the trial court].)

In addition to concluding that telling the jury to view defendant's admissions with caution is unnecessary where the statements constitute the crime, *Zichko* additionally found that so instructing the jury would be inconsistent with the reasonable doubt standard of proof. "To also instruct the jury that the statements 'should be viewed with caution' . . . would have been at least superfluous and may have been confusing to the jury. It could have misled the jury into believing that it could find Zichko guilty even if it did not conclude beyond a reasonable doubt that the statements were made, as long as the jury exercised 'caution' in making its determination." (*Zichko, supra,* 118 Cal.App.4th at p. 1060.)

Although we agree with *Zichko* that the instructions should not be given where the statements at issue constitute the crime, we do not agree that giving the instructions in this case constituted reversible error. First, as we have said, defendant failed to request a limiting instruction. Second, the instructions benefitted defendant because CALCRIM

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[8] An "admission" has a distinct meaning in criminal law: it is an acknowledgement, declaration or concession of a fact or action tends to prove guilt or from which guilt may be inferred. (*Zichko, supra,* 118 Cal.App.4th at p. 1059.)

No. 358 told the jury to decide whether defendant actually made the statement before it considered the content of the statement and because CALCRIM No. 359 told the jury that defendant could not be convicted based on her out-of-court statements alone. Third, the trial court instructed the jury to consider all the instructions together (CALCRIM No. 200). The court instructed on the elements of criminal threats (CALCRIM No. 1300) and on the prosecution's burden to prove each element of the crime beyond a reasonable doubt (CALCRIM Nos. 103, 220). We therefore conclude that a reasonable juror would not have interpreted CALCRIM Nos. 358 and 359 as lowering the prosecution's burden of proof.

V. Jose Iniguez's interpretation of defendant's statement.

Iniguez, a native Spanish speaker, overheard defendant tell Duenas in Spanish that she was " 'going to pay for all this,' " which "[a]ll the Spanish speaking people understand" was a "threat that is maybe paid by your life." Defendant now contends that this was improper lay testimony and his trial counsel, having not objected at trial, rendered ineffective assistance by not doing so. We disagree.

Evidence Code section 800 allows a witness who is not testifying as an expert to testify in the form of an opinion "as is permitted by law, including but not limited to an opinion that is: [¶] (a) [r]ationally based on the perception of the witness; and [¶] (b) [h]elpful to a clear understanding of his testimony." (See also *People v. Hinton*, *supra*, 37 Cal.4th at p. 889 [lay witness may express an opinion based on his or her perception where the concrete observations on which the opinion is based cannot otherwise be conveyed].) "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" (*People v. Williams* (1988) 44 Cal.3d 883, 915.) "Matters beyond common experience are not proper subjects of lay opinion testimony." (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1333.)

Evidence Code section 801, however, provides that if the witness is testifying as an expert, "his testimony in the form of an opinion is limited to such an opinion as is: [¶]

(a) [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) [b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (See also *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651.)

Iniguez's interpretation of what defendant said was a lay, not an expert, opinion. Although defendant argues, essentially, that an expert had to testify what the turn of phrase, "you are going to pay for this," meant in Spanish, Iniguez testified to nothing more than his rationally based perception of what defendant meant by what she said. (See *People v. Farnam* (2002) 28 Cal.4th 107, 153 [officer's "testimony that defendant stood 'in a posture like he was going to start fighting' did not constitute inadmissible opinion testimony of a lay witness"].) There was no error therefore in admitting the evidence.

VI. Admission of evidence.

Although there was no gang enhancement allegation, the trial court admitted gang evidence. Defendant now contends that she suffered a fundamentally unfair trial based on the "extraordinary" amount of gang-related and other evidence. She specifically argues that it was prejudicial error (a) to admit evidence of her daughter's threats and to refuse a limiting instruction regarding those threats; and (b) to admit gang evidence.

A. *Defendant's daughter's threats and the refused instruction*.

The prosecutor asked the trial court to admit evidence that defendant's daughter threatened a witness.[9] The prosecutor represented that after defendant threatened the victim, defendant's daughter told a witness that her boyfriend was an East Side Wilmas gang member. Noting that it went to an element of the crime of criminal threats, that is,

[9] A juvenile case arising out of these events was pending against the daughter, and the trial court refused to take judicial notice of that case.

that it was a credible threat, the court said it would admit the evidence. At trial, Jose Iniguez testified that when he went outside he saw the defendant's daughter. She told Iniguez's son to " 'shut up, Jonathan. I am going—don't get involved because I am going to get my boyfriend to kill you and your dad.' " Defense counsel objected on relevance grounds, and the objection was sustained. Iniguez's son, Rodriguez, next testified that defendant's daughter "told us to get her boyfriend to kill me and my dad." Defense counsel's relevance objection was overruled, but when the prosecutor then asked Rodriguez if he knew whether the daughter had any connections to local gangs, defense counsel's relevance objection was sustained, and the prosecutor was told to "move on."

Defendant argues that evidence of the defendant's daughter's threat was inadmissible against defendant unless there was evidence connecting the defendant to the threat, that is, that she authorized it. She cites *People v. Terry* (1962) 57 Cal.2d 538 and *People v. Brooks* (1979) 88 Cal.App.3d 180. *Terry* and *Brooks* concerned threats made by a third party against a testifying witness. The courts held that to introduce evidence of the threats against the witnesses, there must also be evidence that the defendants authorized the threats. Those cases, however, have no relevance to the admissibility of the threats made by defendant's daughter here. In contrast to the threats in *Terry* and *Brooks*, which were aimed at dissuading witnesses from testifying at trial, the threats here were a part of what was happening at the time defendant threatened Duenas. The evidence was that defendant threatened Duenas, who went outside and was surrounded by people. Defendant's daughter was also outside, and although she directed her threats to Iniguez and Rodriguez, they were relevant to show Duenas's state of mind, that is, that she was in a state of fear, and that her fear was reasonable under the circumstances.

For these reasons, it was also not error for the trial court to refuse defendant's proposed instruction: "Evidence has been introduced as to statements made by [the] defendant's daughter, Lizbeth Lopez. Those statements have been admitted for the limited purpose of determining the mental state of Maribel Duenas. It is not the purpose of this trial to determine whether the statements of the defendant's daughter, Lizbeth Lopez, constituted criminal threats or whether her daughter is a gang member [but] only

those statements of the defendant herself." Defense counsel explained that he didn't want the daughter's statements attributed to defendant. The court said it wasn't sure what statement counsel was referring to, "other than her statements that she . . . was going to call gang members and take care of it."

"The court: The only issue is basically when a threat was made specifically by your client whether or not based on the totality of the circumstance her threat should have been credible and that the victim objectively feared for her life or life of her immediate family members." "My similar analogy would be if you just make a threat it may mean nothing. If you make a threat and you are holding a gun, there is a credible threat? Right? [¶] . . . [¶] . . . If you make a threat and the victim is aware that your client and her children have gang association . . . plus her familiarity with that area, and then the daughter makes a statement about her fellow gang bangers will take care of her, that will go to now from a mere threat to a criminal threat. That could be an argument that could be made, right? It goes to the mental state of the victim. What was her mental state when she heard those words and how it affected her, right?" When defense counsel said that was what the proposed limiting instruction said, the trial court disagreed, and read an instruction ("There may be evidence there are co-perpetrators or multiple defendants. You are to judge this case on whether or not this defendant is guilty of this crime"), presumably a reference to CALCRIM No. 206.[10]

As we have said, what happened with defendant's daughter when Duenas went outside provided context and background to what was happening. The testimony was clear that the daughter, not defendant, threatened Iniguez and Rodriguez. Defendant was not charged with threatening them, and therefore the jury could not have attributed those threats to defendant. The proposed instruction was unnecessary.

[10] The court invited defense counsel to find an instruction on point and submit it, but it does not appear that any other proposed instruction was submitted.

B. Gang evidence.

The trial court admitted evidence that there was gang graffiti in defendant's home, finding that it was relevant to the victim's state of mind. The trial court did not abuse its discretion by admitting the evidence.

Evidence is relevant if it has a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) The test of relevance is whether it "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, disapproved on another ground by *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) "Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. [Citations.] . . . . [¶] However, gang evidence is inadmissible if introduced only to 'show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]' [Citations.] In cases not involving a section 186.22 gang enhancement, it has been recognized that 'evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]' [Citations.] Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, 'trial courts should carefully scrutinize such evidence before admitting it. [Citation.]' [Citations.]" (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.) A trial court's admission of evidence, including gang testimony, is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal .4th 518, 547.) The trial court's ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.)

The gang evidence was properly admitted. Duenas testified that she had been in defendant's apartment in the weeks preceding the threats. While there, she saw gang graffiti in the bedrooms, for example gang monikers and names that were crossed, including one that had "187" pointing to it. Duenas, who lived in the area, was familiar

with the local gang and with aspects of gang culture; in fact, the graffiti frightened her. Therefore, when defendant threatened Duenas, the gang graffiti she had seen in defendant's home was relevant to Duenas's state of mind. Defendant herself may or may not have been associated with a gang. That was not the point of the evidence. It was relevant to prove that Duenas was afraid and that her fear was reasonable under the circumstances.

This case is therefore not like *People v. Albarran* (2007) 149 Cal.App.4th 214. There, the defendant was charged in connection with a shooting that took place outside the victim's home. Although no gang slogans were shouted during the shooting and there was otherwise no direct evidence linking the crime to a gang, the prosecution was allowed to introduce extensive evidence concerning gangs and defendant's membership in a gang. The court found that admission of the evidence violated the defendant's due process rights, rendering his trial fundamentally unfair.

Unlike in *Albarran*, the gang evidence here was limited to the graffiti in defendant's home, and it was introduced solely because Duenas had been in the apartment several weeks before the threats were made and saw the graffiti, which made her later fear understandable. The gang evidence was specific and restricted to this one area. It was not, like in *Albarran*, pervasive and extensive. Defendant did not receive a fundamentally unfair trial because gang evidence was admitted.

V. Sentencing issues.

There were two sentencing errors: first, defendant was entitled to 18 days of custody credits, rather than the 10 she received; and second, the $35 installment fee under section 1205, subdivision (e), should be stricken. The Attorney General concedes the errors.

As to custody credits, defendant was taken into custody on March 16, 2009. She paid bail on April 2, 2009. She was therefore in custody for 18, not 10, days. (§ 2900.5, subd. (a).)

As to the $35 installment fee,[11] it is referenced in the clerk's transcript, but the reporter's transcript does not contain an order to pay such a fee. The "record of the oral pronouncement of the court controls over the clerk's minute order . . . ." (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) The installment fee must be stricken.

DISPOSITION

The abstract of judgment shall be amended to reflect an award of 18 days of custody credits and to strike the $35 installment fee. The clerk of the superior court is directed to forward the amended abstract of judgment to the Department of Corrections. The judgment is otherwise affirmed as modified.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.

[11] Under section 1205, subdivision (e), the fee applies only when the defendant has defaulted on the payment of other fines. The record does not reference such a default by defendant.